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In the Supreme Court of the United States

OCTOBER TERM, 1928

No. 77

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, JAMES K. SYMMERS, GRACE B. DRAKE, et al., as Executors, etc., of Herbert W. Brown, deceased

v.

THE UNITED STATES

ON CERTIFICATE FROM THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The Court of Claims rendered no opinion and the case has not been reported.

JURISDICTION

The case has been certified pursuant to Section 3(a) of the Act of February 13, 1925, c. 229, 43 Stat. 936, 939.

THE QUESTIONS PRESENTED

The questions certified are as follows (R. 7):

"Question I. Whether the tax imposed by the final clause of section 402(f), Revenue Act of 1921,

42 Stat., 278, on life insurance policies payable in terms to beneficiaries 'other than the decedent or his estate' is a direct tax on property and void because not apportioned.'

"Question II. Whether the $9,146.76 tax imposed bears such an unreasonable relation to the subject matter of the tax as to render it void."

The statutory provisions are hereinafter set forth.

THE STATUTES INVOLVED

The revelant provisions of the Revenue Act of November 23, 1921, c. 136, 42 Stat., 227, are as follows:

> SEC. 401. That, in lieu of the tax imposed by Title IV of the Revenue Act of 1918, a tax equal to the sum of the following percentages of the value of the net estate (determined as provided in section 403) is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this Act, whether a resident or nonresident of the United States: (42 Stat. 277.)

Here follows table of percentages.

> SEC. 402. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated— (42 Stat. 278.)
>
> * * * * *
>
> (c) To the extent of any interest therein of which the decedent has at any time made

a transfer, or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death (whether such transfer or trust is made or created before or after the passage of this Act), except in case of a bona fide sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title; (42 Stat. 278.)

* * * * *

(f) To the extent of the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life; and to the extent of the excess over $40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life. (42 Stat. 279.)

SEC. 403. That for the purpose of the tax the value of the net estate shall be determined—

(a) In the case of a resident, by deducting from the value of the gross estate—

Here follow as deductions allowed from the gross estate, determined as provided in Section 402, certain amounts for debts, expenses, losses, charitable

gifts, etc., and a specific exemption of $50,000. (42 Stat. 279–280.)

> SEC. 406. * * * The executor shall pay the tax to the collector or deputy collector * * *. (42 Stat. 281.)
>
> SEC. 408. * * * If any part of the gross estate consists of proceeds of policies of insurance upon the life of the decedent receivable by a beneficiary other than the executor, the executor shall be entitled to recover from such beneficiary such portion of the total tax paid as the proceeds, in excess of $40,000, of such policies bear to the net estate. If there is more than one such beneficiary the executor shall be entitled to recover from such beneficiaries in the same ratio. (42 Stat. 282.)
>
> SEC. 409. * * * (b) if insurance passes under a contract executed by the decedent in favor of a specific beneficiary, and if in either case the tax in respect thereto is not paid when due, then the transferee, trustee, or beneficiary shall be personally liable for such tax, and such property, to the extent of the decedent's interest therein at the time of such transfer, or to the extent of such beneficiary's interest under such contract of insurance, shall be subject to a like lien equal to the amount of such tax. * * * (42 Stat. 283.)

STATEMENT

On September 13, 1922, the New York Life Insurance Company issued to Herbert W. Brown three policies of insurance upon his life, two for

$50,000 each and one for $100,000, and in these policies his wife, Mabel L. Brown, was named as beneficiary. (R. 4.)

On September 29, 1922, pursuant to his right under the policy to change the beneficiary, Mr. Brown made his two children, Elizabeth and Richard, beneficiaries under the $100,000 policy in place of his wife. (R. 4.) He paid the first and second annual premiums due in 1922 and 1923, respectively, amounting to $16,230. (R. 5.)

On April 10, 1924, Mr. Brown died in New York, leaving a will which was duly probated and the plaintiffs are the duly qualified executors under that will. The Chase National Bank is also guardian of Elizabeth G. Brown and Richard L. Brown, the two minor children of the deceased, and is also Committee of the property of Mabel L. Brown, the widow, who has been adjudged an incompetent. (R. 5.)

On July 30, 1924, the New York Life Insurance Company paid the amount of the three policies including accrued dividends, $100,444.10, to Mabel L. Brown's Committee, and $100,444.11 to the guardian of the minor children. (R. 5.)

For the purposes of assessing the estate tax under the Revenue Act of 1921, Mr. Brown left a gross estate, not including any part of the insurance, of $524,336.29

to which the Commissioner of Internal Revenue added the amounts paid under the policies	$200,888.21
making a total of	725,224.50
There were allowed as lawful deductions, including the $40,000 exemption allowed in Section 402(f) of the Act	139,662.93
The net estate as fixed by the Commissioner was	585,561.57

The tax assessed by the Commissioner was $21,633.69, and the amount paid by the executors was $21,691.66. (R. 6.)

In respect to $9,146.76 of the tax the executors paid it under protest upon the ground that the Commissioner had no right to include in the value of the decedent's gross estate the sum of $160,888.21 (the proceeds of the policy less the $40,000 deduction). That sum, $9,146.76, is the amount by which the Federal estate tax on Mr. Brown's estate was increased by reason of including the proceeds of the insurance companies less the $40,000 exemption. (R. 6.)

Claim for refund was duly filed by the executors, and six months having elapsed without action by the Commissioner, suit was brought in the Court of Claims.

Copies of the policies annexed to the petition which accompanies the certificate (R. 1) are set

forth at length beginning opposite page 14 of the record. They are policies of the modern type quite different from the old-fashioned straight life policy.

The first, Annex "A," names the wife as the beneficiary "with the right on the part of the insured to change the beneficiary in the manner provided in Section 6." The premiums are payable during the life of the insured. The face amount is $50,000, with so-called double indemnity for fatal accident, and disability benefits; that is, double the face of the policy will be paid if death results from external, violent, or accidental cause, and should the insured become wholly and permanently disabled before the age of sixty, the company agrees to pay to him one per cent of the face of the policy each month during his life, and also to waive the payment of premiums.

It is a participation policy. Beginning at the end of the second year the portion of divisible surplus accruing upon the policy, as apportioned by the company, shall, at the option of the insured, be either (*a*) paid in cash, or (*b*) applied toward payment of premiums, or (*c*) applied to purchase additional paid-up insurance, or (*d*) left to accumulate, at interest, with the company. Whenever the cash value of the policy equals or exceeds the net single premium at the then attained age of the insured the company agrees, upon the insured's request, to indorse the policy as a fully

paid-up policy; or, whenever the cash value shall equal the face amount of the policy the company, upon surrender of the policy, will pay in cash the face amount thereof.

After three full years' premiums have been paid, the company agrees to loan on the security of the policy amounts specified, or the insured may surrender the policy and receive the surrender value in cash or in the amount of paid-up insurance which the surrender value will purchase at that time. The surrender value is the reserve on the policy at the end of the insurance year computed on the basis of the American mortality table with interest at 3 per cent. There is also a provision, Section 5, for term insurance to cover any loan under the policy.

The insured may assign the policy, or at any time, and from time to time, change the beneficiary, provided the policy is not then assigned, by written notice to the company, accompanied by the policy, for endorsement of the change. Should any beneficiary die before the insured, the interest of such beneficiary vests in the insured. The privilege is also given the insured, prior to the age of 55 years, without medical examination, to exchange the policy for one upon any other plan of insurance issued by the company upon terms and conditions set forth. If there is no assignment of the policy the insured, or, in case the insured shall not have done so, the beneficiary after the insured's death may, by written notice to the company, make the

proceeds of the policy payable under one of several optional methods of settlement set forth in Section 8.

Finally, "the insured may, without the consent of the beneficiary, receive every benefit, exercise every right and enjoy every privilege conferred upon the insured by this policy." Except for the disability and double indemnity features, the terms of the other two policies are identical with those of the first.

SUMMARY OF ARGUMENT

The tax is an excise, not a direct tax. The only question is whether it is arbitrary and unreasonable to include in the measure of decedent's estate the proceeds of the life insurance policies.

The ownership of the policies remained in the decedent until the moment of his death. They were bought with his money and were an asset over which he had complete control while he lived and could at any moment have made payable to his estate, and if a named beneficiary should have predeceased him they would by their terms have been so payable. In bankruptcy they would have been an asset passing to the trustee.

They bore such a direct relation to his estate after death that for many years the extent to which they should be exempt from the rights of creditors has been the subject of legislative regulation.

By common understanding they are regarded as part of the estate which a man leaves when he dies,

and in England for many years have been included in the measure of death duties. Therefore, for Congress to include them was not arbitrary but was reasonable, for they bore a just and proper relation to the subject-matter of the tax.

ARGUMENT

I

THE TAX IS NOT A DIRECT TAX BUT AN EXCISE UPON THE TRANSFER OF AN ESTATE ON THE DEATH OF THE OWNER

By Section 401, the tax is imposed "upon the transfer of the net estate of every decedent dying after the passage of this Act." The value of the net estate is found by subtracting from the gross estate certain statutory deductions.

By Section 402 the value of the gross estate is determined by including the value at the time of decedent's death of all property—

(*a*) To the extent of the interest which, after his death, is subject to the payment of charges against his estate, expenses of administration and subject to distribution.

(*b*) To the extent of any interest therein of the surviving spouse such as dower, curtesy, or by virtue of a statute creating an estate in lieu thereof.

(*c*) To the extent of any interest of which the decedent has made a transfer or created a trust in contemplation of, or intended to take effect, in possession or enjoyment at or after his death.

(*d*) To the extent of the interest therein held jointly or as tenants in the entirety by the decedent and any other person.

(*e*) To the extent of any property passing under a general power of appointment exercised by the decedent by will, or by deed intended to take effect at or after his death.

(*f*) To the extent of the amount receivable by the executor as insurance, under policies taken out by the decedent upon his own life, and to the extent of the excess over $40,000 of the amount receivable by all other beneficiaries of such policies.

From the gross estate as thus determined there is deducted (Section 403)—

(1) Funeral and administration expenses, debts, losses from fire, etc., and such amounts as are allowable by the laws of the jurisdiction for the support during the settlement of the estate of those dependent upon the decedent.

(2) An amount equal to the value of the property forming a part of the gross estate of any person who died within five years prior to the death of the decedent, where such property can be identified as having been received by the decedent from such prior decedent, and where a Federal estate tax has been paid upon such property.

(3) Bequests, legacies, etc., to the United States or political subdivision thereof, or for religious, charitable, scientific, literary, or educational purposes.

(4) An exemption of $50,000.

The resultant is the "net estate," and is the amount which Congress has said shall be treated for tax purposes as the value of the estate. It is apparent that the tax as thus measured, assessed, and paid is not a tax upon the "residue" (*Edwards* v. *Slocum*, 264 U. S. 61, 62) or upon any specific property, or upon the transfer or devolution of title thereto. It is no more a tax upon the proceeds of the insurance policies than it is a tax upon the real estate, bank deposits, or bonds of the deceased. It may not even approximate the actual value of the estate. The tax is an excise or "death duty" upon the transfer of decedent's estate, like the Estate Tax under the Revenue Act of 1918, c. 18, 40 Stat. 1057, 1096, considered in *Y. M. C. A.* v. *Davis*, 264 U. S. 47. That such a tax is an excise tax and not a direct tax is no longer open to doubt. *Knowlton* v. *Moore*, 178 U. S. 41; *New York Trust Company* v. *Eisner*, 256 U. S. 345; *Greiner* v. *Lewellyn*, 258 U. S. 384; *Y. M. C. A.* v. *Davis*, 264 U. S. 47; *Edwards* v. *Slocum*, 264 U. S. 61; *United States* v. *Woodward*, 256 U. S. 632.

The real contention of the plaintiffs is not directed against the tax but against the standard by which the tax is to be measured.

The argument of the plaintiffs may be reduced to these propositions:

(*a*) The policies of insurance were the exclusive property of the beneficiaries and formed no part of Mr. Brown's estate;

(*b*) To include them in the measure of his estate, therefore, was in effect to impose a direct tax upon them, or

(*c*) If not a direct tax upon them, the effort was to tax one person for what another person owned. Therefore the tax is so unreasonable as to be void.

II

THE POLICIES BELONGED TO MR. BROWN WHILE HE LIVED, AND THEIR PROCEEDS, AFTER HIS DEATH, HAD A CLOSE AND DIRECT RELATION TO THE ESTATE WHICH HE LEFT, RECOGNIZED BY STATUTE, BY POPULAR UNDERSTANDING, AND, FOR TAXING PURPOSES, BY HISTORIC PRECEDENT

(*a*)

The ownership of the policies, as well as all beneficial rights and interests therein, remained in the decedent until his death

These policies were not bought by Mr. Brown to indemnify a creditor, nor were they taken out upon his life by a creditor or some one else having a so-called insurable interest, who paid the premiums and thereby obtained indemnity. While all life insurance has in it the element of protection, in modern level premium life insurance the business is largely that of a savings investment and the premium is in the nature of a savings deposit.

Mutual savings banks pay to the depositor his deposit with the interest earned less the expense of management. The insurance company does the

same, the difference being merely that the savings bank undertakes to pay to each depositor the whole of his deposit with interest, while the life insurance company undertakes to pay to each member of a class the average amount, regarding the chances of life and death, so that those who do not reach the average age get more than they have deposited and those who have exceeded the average age, less than they have deposited. *Penn Mutual Life Insurance Company* v. *Lederer*, 252 U. S. 523, 531.

The old idea that life insurance was solely for the benefit of those who survived the insured, has wholly disappeared. The policies which we have here, secured for Mr. Brown the moment he bought them substantial benefits which remained his absolutely and of which he could not be deprived while he lived. One of them assured him an income for life, if he became disabled, without further payment of premium. Each of them became available as collateral for loans and provided a cash surrender value. The moment he paid the first premium he acquired an asset which he had the power to do with as he pleased during life and dispose of as he chose at death.

He also assumed an obligation. Insurance contracts of this kind are not contracts for a year with the privilege of renewal from year to year, but are "entire contracts for life" subject to forfeiture, of course, by failure to perform the conditions. *McMaster* v. *New York Life Insurance Company*, 183

U. S. 25, 35. The premiums constitute an annuity the whole of which is the consideration for the entire assurance for life. *New York Life Ins. Co.* v. *Statham*, 93 U. S. 24.

The obligation of the insured to pay the premiums for life is the consideration for the promise of the company to pay the face of the policy at death. Indeed the reserve at the end of any year is the difference between the present values at that time of these reciprocal contracts. The fact that Mr. Brown died in the early years of the policy when the cash value was negligible, instead of later, when those values were large and approached the face value, does not alter the principle. The payment of the first premium and his obligation to continue to pay premiums entitled him at once to all the contractual benefits under the policies. The policies were his, and his alone, and were part of his estate. To the extent of their cash surrender value they would have passed to his trustee in bankruptcy. *Burlingham* v. *Crouse*, 228 U. S. 459; *Cohen* v. *Samuels*, 245 U. S. 50.

By the express terms of the policies the right to participate in the surplus and receive the dividends; to borrow; to surrender; to convert into other forms of insurance; to assign; to change the beneficiaries; in short to "receive every benefit, exercise every right and enjoy every privilege conferred upon the insured by this policy" belonged to him and to him alone, and could be received, exer-

cised, and enjoyed without the consent of the beneficiaries. Upon his death those rights ceased, his obligations ended, the policy "matured."

What passed to the beneficiaries was what he had bought by performing his policy obligations and by failing to exercise his policy privileges. He had, during life, subtracted from his means money which, when he died, was to "reappear in the form of a beneficial interest accruing or arising on his death." (See *Lethbridge* v. *Attorney General*, (1907) A. C. 19, 23.)

Such being the fact it only tends to confuse the question here involved to argue whether the beneficiary's interest was "vested," or "vested subject to be divested," or "contingent," or a "mere expectancy." Whether it was like an estate to last until "A" comes from Rome, or unless "A" comes from Rome, or if "A" comes from Rome, is unimportant. It is plain that the beneficiaries could exercise no control, enjoy no right, derive no benefit from the policies until Mr. Brown should die, and then their rights and benefits would be only those which he chose to leave to them.

Under such policies it seems to be well settled that the beneficiary has no right or interest properly described as "vested," but merely an expectancy.

In *Mutual Benefit Life Insurance Company* v. *Swett*, 222 Fed. 200 (C. C. A. 6th Cir.), the court after stating that the rule was well settled that un-

der an ordinary policy of life insurance in which there was no reservation of a right to change the beneficiary the beneficiary acquired the moment the policy was issued a vested right which could not be affected by any act of the insured, said at page 204:

> If, however, by the terms of the policy itself there is reserved to the insured the right, without the consent of the beneficiary, to change the appointee with the assent of the insurer, the beneficiary acquires only an expectancy and not a vested interest during the life of the insured. * * *
>
> The right so reserved rests upon the terms of the contract, and is the same as that conferred on the insured by the certificate, charter, or by-laws of a mutual or benefit association, when insurance is effected in such an organization. As the policy to Swett stipulated that he might, on his written request of the company for its appropriate indorsement on the policy, change the beneficiary, his wife did not acquire a permanent or vested interest in it. The existence of such an interest during her husband's lifetime was made impossible by the control over the contract of insurance given to him, independent of her will. Her right was inchoate, a mere expectancy during his lifetime, dependent on the will and pleasure of her husband as holder of the policy, and could not vest until his death happened with the policy unchanged. His control over the policy was, subject to its items, as complete as if he him-

self had been the beneficiary. *Denver Life Ins. Co.* v. *Crane*, 19 Colo. App. 191, 200, 73 Pac. 875. The wife had no vested interest which she could assign until the death of her husband—no assignable or transferable interest in the policy until some right of action on it accrued in her favor. May on Ins., Sec. 399 F; *Sabin* v. *Phinney*, 134 N. Y. 423, 428, 31 N. E. 1087, 30 Am. St. Rep. 681.

In *Reid* v. *Barborak*, 272 Fed. 99 (C. C. A. 4th Cir.), the court said at page 101:

> It is true that one named as beneficiary has no vested interest and is not entitled to notice of change; that the right to change a beneficiary is a property right of the assured, which in the case of insolvency the court can require him to exercise in favor of his creditors.

Citing *Cohen* v. *Samuels*, 245 U. S. 50.

In *Cohen* v. *Samuels*, 245 U. S. 50, this Court held that a policy of insurance held by a bankrupt, which had a cash surrender value at the time of the adjudication, became an asset in the trustee even when the policy was payable to some one other than the bankrupt, his estate, or personal representatives, if the bankrupt has reserved absolute power to change the beneficiary. Referring to the fact that the policies were not payable to the bankrupt or his estate, the Court said, page 53:

> It is true the policies in question here are not so payable, but they can be or could have been so payable at his own will and by simple

declaration. Under such conditions to hold that there was nothing of property to vest in a trustee would be to make an insurance policy a shelter for valuable assets and, it might be, a refuge for fraud.

In *Mutual Reserve Fund Life Association* v. *Cleveland Wooden Mills*, 82 Fed. 508 (C. C. A. 6th Cir.), the court had under consideration a policy issued by a company conducting an insurance business on the cooperative or assessment plan, and under the statute of New York, where the Association was organized, any member had the right at any time, with the consent of the Association, to make a change in the payee or beneficiary without the consent of the latter. Circuit Judge Lurton, writing for the court, said at page 519:

> Mrs. Parker had no vested interest in this policy, and the assured, under this provision of the law governing this contract, had the right to change the beneficiary. There was no contract between the member and payee by which any interest was vested in Mrs. Parker. The original designation of Mrs. Parker as the beneficiary was in the nature of an inchoate or unexecuted gift, and left the member free, under the provision of the law above quoted, to change the payee at his pleasure, with the consent of the company. That Mrs. Parker paid some of the assessments is not material, as it is not shown that she did so with her separate estate, or under any contract by which she was to acquire a vested right.

See also *New York Life Insurance Company* v. *Cook*, 237 Mich. 303; *Schoenholz* v. *N. Y. Life Ins. Co.*, 234 N. Y. 24; *May on Insurance*, Sec. 399 (m); *Cooley's Briefs on Law of Insurance*, page 3755; *Joyce on Insurance*, Sec. 731.

In *Barbour* v. *Equitable Life Assurance Society*, 174 App. Div. 759 (affirmed without opinion, 225 N. Y. 675), the court said, at page 761:

> The plaintiff was the beneficiary named in the policy, but of course had no substantial right in the same until after the death of her husband while the policy was in force; up to his death, and while in possession of the policy, Mr. Barbour had an absolute right to change his beneficiary, and the plaintiff was not a party to the contract in any material sense while her husband was alive and prepared to act.

Even where there is no right to change the beneficiary, his rights are not vested so absolutely that they can not be divested, and they are subject to the other terms of the contract.

In *Schuberth* v. *Credential Insurance Company*, 86 Pa. Superior Court 80, the court said, at page 82:

> Appellant argues that it is useless to say that she has a vested interest if he can borrow money against the policy; that the right to borrow is in reality a right to exhaust the benefits of the policy presently. There is force in this contention but the answer is that the parties had made their contract and

> the interest in the beneficiary, although vested, is subject to the provisions of the contract. The contract expressly declares that the insured may borrow.

In *Smith* v. *Metropolitan Life Insurance Company*, 222 Pa. 226, it appeared that one Gordon took out five policies on his own life. No beneficiary or person to whom the insurance should be paid on the death of the insured was named in any of the policies, but from matter contained in the applications for three of them, and by concessions at the trial, the trial court treated all the policies as though Gordon's wife had been named as the beneficiary. The wife died first, and thereafter the husband, by written order on a blank furnished by the company, appointed his daughter as the beneficiary. She brought suit, and on the trial was nonsuited on the ground that the interest in the policies had "vested" in the wife and at her death passed to her administrator as part of her estate. In reversing the judgment the Supreme Court of Pennsylvania said, at page 229:

> The naming of a beneficiary to whom payment is to be made is a gift of a benefit in future, but is contingent on the circumstances. Thus it carries with it no obligation to the beneficiary that the donor will keep the policy alive by continuing to pay the premiums. That is contingent on his doing so voluntarily. And the nature of the thing given would seem to imply that the beneficiary must survive the insured. Thus in the pres-

> ent case the gift is equivalent to a provision that when the husband dies, having kept the policy alive, the wife shall be entitled to the money. But the intent is to provide for her, not for any other, and if she has died first, the expressed intent is incapable of fulfillment and we are not at liberty to supply a further intent which the donor did not indicate. He might have done so by naming her executor, or administrator, or children, at his own choice, but as he did not do so we are not authorized to make a choice for him. The natural presumption is that he did not desire such result, nor intend to continue to pay premiums for the benefit of any other person.

It would, of course, be idle to say that there are not cases containing language to the contrary; but we are not concerned so much with matters of terminology as we are with matters of substance. The rights of the beneficiaries under policies involved in this case are plain, whatever term may be used in describing them. It is, of course, beyond dispute that upon Mr. Brown's death the right of the beneficiaries to the proceeds vested subject to the rights of creditors hereinafter discussed. Up to that time they had nothing of present value which could be assigned; which would serve as security for a loan, or which at the death of the beneficiary would pass to the heirs or personal representatives.

The policies were at all times subject to the right of the assured to surrender them for cash or borrow from the company upon them, and if they had been in force long enough, borrowing might have rendered them practically valueless, for if Mr. Brown had availed himself of his right to borrow from the company *the amount of the loans would have been payable out of the policies and not out of funds of his estate in the hands of his executors.* *Wagner* v. *Thieriot*, 203 App. Div. 757, affirmed 236 N. Y. 588 on opinion below.

Perhaps we have given more space to this question than is necessary. Plaintiffs, however, seem to feel, correctly as we think, that their whole case depends upon establishing this point. Their principal reliance is upon *Tyler* v. *Treasurer and Receiver General*, 226 Mass. 306, and *Central Bank of Washington* v. *Hume*, 128 U. S. 195. In the former case the court was called upon to decide whether the proceeds of certain life insurance policies were, under the Massachusetts succession tax, imposed by St. 1912, c. 678, Section 1, as amended by St. 1913, c. 498, property "which shall pass by * * * gift * * * made or intended to take effect in possession or enjoyment after the death of the grantor."

After a general discussion of the relation between the insured and the beneficiary, under life insurance policies, the conclusion was that "such a relation does not by fair intendment come within

the descriptive words of the statute." That conclusion was strengthened by reference to the principle that "tax laws are not to be stretched beyond their reasonable meaning, but rather in cases of doubt are to be construed with some strictness." "If an alleged right to tax does not fall within the words of the governing statute, it does not exist." The court added, page 310—

> This conclusion is confirmed by the practical construction put upon the law by those charged with the enforcement of the law through many years, a circumstance sometimes entitled to considerable weight.

With the conclusion of the court we have no quarrel. It does not by any means carry with it the inference, however, that the court would have found anything objectionable in the statute had it, in so many words, said that the proceeds of life insurance policies should be included in measuring the estate.

The report of the case does not describe the policies beyond saying (p. 309)—

> None of the policies in the cases at bar are commercial contracts which bear any earmarks of being designed to avoid the operation of the tax law. On the contrary, they are well-recognized forms of insurance which have been in common use for a long time.

Chief Justice Rugg's discussion of the nature of insurance policies is based upon decisions of the Massachusetts courts, and upon *Central Bank of*

Washington v. *Hume*, 128 U. S. 195, where it is said at page 206:

> It is indeed the general rule that a policy, and the money to become due under it, belong, the moment it is issued, to the person or persons named in it as the beneficiary or beneficiaries.

That, of course, is not an accurate statement of the law today as applied to policies such as we are now considering. *Burlingham* v. *Crouse*, 228 U. S. 459; *Cohen* v. *Samuels*, 245 U. S. 50.

The case of *Central Bank of Washington* v. *Hume*, 128 U. S. 195, has been frequently cited, sometimes without due regard to the facts involved. The question decided is set forth in the syllabus as follows:

> The payment of premiums to a life insurance company by a married man residing in the District of Columbia, who is insolvent at the times of the payments, in order to effect and keep alive a policy of insurance upon his own life, made by his wife for the benefit of herself and their children, is not necessarily a fraudulent transfer of his property with intent to hinder, delay and defraud creditors within the meaning of 13 Eliz. c. 5; and in the absence of specific circumstances showing a fraudulent intent, his creditors, after his decease, will have no interest in the policy.

Mr. Hume having been insolvent at the time the insurance was effected, and having paid the premi-

ums himself, it was urged that the policies were within the provisions of the statute of Elizabeth and inured to the benefit of his creditors, as equivalent to transfers of property with intent to hinder, delay and defraud.

It does not appear that the policies contained any power to change the beneficiaries or other provisions similar to those in the policies we are now considering. One of them was for the " sole use and benefit of his wife, Annie Graham Hume and his children, payment to be made to them, their heirs, executors, or assigns * * *" (p. 195.) Some were payable to the wife if living, but otherwise to Hume's legal representatives. One was payable to "the said insured, Annie G. Hume, for her sole use, her executors, administrators, or assigns." (p. 196.) One was payable to Annie G. Hume and her children by him, or their legal representatives." (p. 197.)

The court treated the contracts as having been *made by the wife herself upon the insurable interest of herself and her children in her husband's life.* After discussing the object of the statute of Elizabeth, and the nature of insurable interests, the Chief Justice said (p. 206):

> We think it can not be doubted that in the instance of contracts of insurance *with a wife or children*, or both, upon their insurable interest in the life of the husband or father, the latter, while they are living, can exercise no power of disposition over the

> same without their consent, * * *. (Italics supplied.)

Then follows the sentence upon which so much stress is laid (p. 206):

> It is indeed the general rule that a policy, and the money to become due under it, belong, the moment it is issued, to the person or persons named in it as the beneficiary or beneficiaries, and that there is no power in the person procuring the insurance by any act of his, by deed or by will, to transfer to any other person the interest of the person named.

It is apparent that this language was used with reference to the policies then under consideration. In so far as it holds that a policy, and the money to become due under it, belongs the moment it is issued to the beneficiary, and that there is no power in the person procuring the insurance to transfer to any other person the interest of the person named, it has not, and can not have any application to such policies as are here involved. That would of course be inconsistent with the later decisions of this Court in *Burlingham* v. *Crouse*, 228 U. S. 459, and *Cohen* v. *Samuels*, 245 U. S. 50.

This Court has distinguished the case in *Royal Arcanum* v. *Behrend*, 247 U. S. 394, in which it was said (p. 398):

> This court held in *Washington Central Bank* v. *Hume*, 128 U. S. 195, 206, that under the ordinary policy of life insurance, when no right is reserved to surrender the policy

> or to change beneficiaries, the beneficiary named therein acquires, at the moment it is issued, a vested right which can not be affected by any act of the insured subsequent to the execution of the policy. The rule there declared was deemed by the Court of Appeals to control the case at bar. But it was not applicable; because the contract sued on was a benefit certificate of a fraternal benefit association, not an ordinary policy of life insurance; and also because the benefit certificate on its face reserves the right to change beneficiaries.

The policies considered in the *Hume* case were issued between 1872 and 1881, and the case was decided in 1888.

It was well said in *Schade* v. *Western Union Life Insurance Company*, 125 Wash. 200, 205:

> Until the last two or three decades, life insurance policies did not contain any express reservation of power in the insured with reference to a change of the beneficiary, and in all of the earlier cases if the courts in construing policies concluded there was conferred upon the beneficiary named in the policy what was termed a vested interest, because of any rule of substantive law or public policy, or simply by judicial construction of the particular contract under consideration, those decisions can be of little purpose here, where, by the terms of the policies, the insured was given unlimited power and control so far as the rights of the beneficiary are concerned.

It is safe to say that no life insurance company would dream of instructing its agents when selling policies to represent to prospects that such policies as these belonged, the moment they were issued, to the person named as beneficiary whose rights could not thereafter be affected by any act of the insured.

(*b*)

The Relation to the Estate of a Decedent of the Proceeds of Insurance upon his Life

In New York, since 1840, by statutory provision, insurance on a husband's life for the benefit of his wife, where the annual premiums paid from the husband's property exceeded a certain sum, $500 at the present time, that portion of the insurance money purchased by the excess of premiums has been liable for the husband's debts if his estate was insolvent. Domestic Relations Law, c. 14, Consolidated Laws, Section 52, derived through various revisions from c. 80 of the Laws of 1840; *Kittel* v. *Domeyer*, 175 N. Y. 205; *Guardian Trust Company* v. *Straus*, 139 App. Div. 884, affirmed without opinion, 201 N. Y. 546. The latter case held that it was the duty of an executor to reduce this asset to possession. Statutes of this kind are exemption statutes. *Elsom* v. *Gadd*, 93 Wash. 603.

In *Kittel* v. *Domeyer*, 175 N. Y. 205, 212, in discussing the New York statute it was held that the wife's right did not rest upon the contract but "upon a legislative grant, by way of exemption

from the claims of creditors, of an insurance fund, created by the husband's annual appropriation, or investment of his moneys. * * * The right of the State is clear to change and to regulate the exemption, before the insurance fund, which the husband accumulates during his life, reaches the wife."

In Connecticut, ever since 1850, there have been statutory provisions making the amount of the premiums in excess of a given amount, together with interest thereon, chargeable with the husband's debts. In *Bartram* v. *Hopkins*, 71 Conn. 505, the court, after tracing the statute back to its source in a law passed in 1850, prior to which time the property rights of married women were substantially those conferred by the common law, by which a husband, whether solvent or insolvent, could not make a gift to his wife of personal property which would be valid against him or his creditors, said, at page 518:

> In both acts, for one thing, we think the legislature intended to limit the amount which a husband could divert from his creditors in this particular form of gift, and to say that all given beyond the statutory amount should be liable to his creditors.

The conclusion was that the plaintiff did not have to show that the excess premiums were paid in fraud, actual or constructive, of creditors.

In *Coates* v. *Worthy*, 72 Miss. 575, the court discussed a statute which provided that insurance to

the amount of $5,000, payable to the executors or administrators, should inure to the heirs or legatees of the decedent free from liability for his debts, but if he was otherwise insured for the benefit of heirs or legatees at the time of his death the sum collected should be deducted from the $5,000 and the excess only should be exempt.

There are numerous statutory provisions in the different jurisdictions exempting proceeds of insurance upon the life of a debtor from payment of his debts, sometimes with limitations as to the amount or as to the beneficiary entitled to the exemption. See 25 *Corpus Juris*, p. 72, title "Exemptions." But it is unnecessary to discuss them. The details of these various statutory provisions and of the cases arising under them are not important. The important thing is that for years, and ever since life insurance attained recognition as an economic feature of every-day life, its relation to a man's estate has been deemed generally a proper subject for legislative consideration, definition, and regulation. The proceeds of a policy have been treated as a "fund" which the insured "accumulates during his life," and the State has a clear right to regulate the exemption from claims of creditors to which it shall be entitled. *Kittel* v. *Domeyer*, 175 N. Y. 205.

This Court held in *Bank of Minden* v. *Clement*, 256 U. S. 126, that a life-insurance policy payable to the executors, administrators, or assigns of the insured was his property, subject to the claims of

his creditors, and that a State law exempting the avails of such policies from his debts was invalid as applied to a debt antedating the law, and to policies antedating it though later than the note evidencing the debt. There is very little practical difference between such a policy and one under which the insured can change the beneficiary from his estate to another and back again at will and as often as he pleases.

(c)

The popular conception of Life Insurance as part of a Decedent's Estate

It is safe to say that the amount of life insurance which one carries is almost universally regarded in common understanding and popular speech as part of the estate which he "leaves" when he dies. In the case of men of large wealth the insurance may be, and probably in most cases is, so small proportionately that it is not noticed. In the case of many men it is about all they leave.

In the case at bar the gross estate exclusive of insurance was about two and one-half times the life insurance. Probably no man ever insured his life in favor of those who were the natural objects of his solicitude, without at the same time registering the thought that then and there he had acquired an estate, an asset while he lived, and something which he could leave to his family upon his death.

Under the modern form of policy, where the insured has complete control with the right to change of beneficiary at will, and with the right to exercise the various options which the policies provide, this popular conception is in accord with the realties of the situation. In popular thought it is as much a part of a man's estate as anything he possesses. He can pledge it, spend it, or lose it while he lives, and by will can provide for its disposition afterwards.

No man making inventory of his possessions for the purpose of drawing his will would fail to take account of his life insurance, and the relation of the insurance to his other property might, and in many cases undoubtedly does, control the disposition of the other property. If the average man includes his life insurance in measuring his estate for the purpose of making testamentary disposition thereof, what reason is there why Congress should not apply the same measure for purposes of taxation? It can not be arbitrary, capricious, unreasonable, and confiscatory for Congress to reason as does the ordinary man in respect to the same question.

On December 10, 1914, Honorable A. Barton Hepburn delivered an address at the annual meeting of the Association of Life Insurance Presidents in the City of New York, upon "the relation of life insurance to the credit fabric of business." In the course of the address, speaking of the man who carried life insurance, he said:

> Anxiety and worry yield to the comforting conviction, day by day, that his insurance will enable his estate to make full restitution to those who have given him their confidence and credit, or better still, that his insurance will care for and maintain his loved ones when his supporting hand no longer avails.

(*d*)

Historically the Proceeds of Life Insurance Policies have for many years been included in the Measure of Death Duties

In *Knowlton* v. *Moore*, 178 U. S. 41, this Court sustained the legacy tax under the War Revenue Act of 1898, and afterwards in *New York Trust Company* v. *Eisner*, 256 U. S. 345, the estate tax under the Act of September 8, 1916, c. 463, 39 Stat. 756, 777. In each case the statute was assailed as imposing a direct tax without apportionment, and in each case the decision was based largely upon the practical and historical ground that such taxes had always been regarded as duties or excises and not by attempting to make scientific distinctions. 256 U. S. 349.

In *Knowlton* v. *Moore* the Court pointed out that death duties in one form or another had for many years, in England and other countries, been regarded not as direct taxes but as excises. After referring to the fact that such taxes were known to the Roman law and the ancient law of the Continent of Europe, the Court said (178 U. S. 48):

> The term "Death Duties," by which inheritance and legacy taxes, in whatever form imposed, are described in England, indicates the generic nature of such taxes.

The Court quoted from Hanson's Death Duties, showing the development of such forms of taxation from the probate duty in 1694 down to the Finance Act of 1894. In 1780 the probate duty was supplemented by what came to be known as a legacy tax, and in 1853 the probate duty tax and the legacy tax were supplemented by a tax known as the succession duty. As showing the nature of the Succession Duty the Court quoted from Hanson, page 50 as follows:

> Succession duty is a tax placed on the gratuitous acquisition of property which passes on the death of any person, by means of a transfer (called either a disposition or a devolution) from one person (called the predecessor) to another person (called the successor).

In a note to Section 2 of that Act, Hanson, after quoting decisions, says (p. 629):

> It follows from these decisions that a gratuitous assignment *inter vivos* by the owner of a policy of assurance effected on his own life, creates a succession between him and his assignee in respect of the moneys which are received after his death by virtue of the policy, and it is the constant practice to pay duty under such circumstances (see opinion of Sir Wm. Atherton and Sir Roundell

> Palmer, *Re Earl of Aberdeen*, 11 March, 1862, MS.), and it makes no difference in such a case that he does not expressly bind himself to pay the premiums necessary for keeping the policy on foot, if in point of fact he actually does pay them, for it is evident that under such circumstances the whole of the assurance money is derived from his gift. If, however, the premiums are paid by the assignee, no succession duty is payable (*Ld. Adv.* v. *Fleming*, 1897 A. C. 145; *Ld. Adv.* v. *Robertson*, 22 S. S. C. 4th ser. 568).

The Succession Duty Act of 1853 was followed by the Finance Act of 1894, creating what was called an estate duty. That Act provided in Section 2 (Hanson, page 82) that "property passing on the death of the deceased shall be deemed to include," among other things, any annuity or other interest purchased or provided by the deceased either by himself alone, or in concert, or by arrangement with any other person to the extent of the beneficial interest accruing or arising by survivorship or otherwise at the death of the deceased. In a note to this section Hanson says, page 105:

> Policies of assurance included in a marriage settlement come within this sub-section; for such a policy is an interest provided by the deceased, generally by arrangement with some other person, whereby a beneficial interest arises on the death of the deceased.

Among other cases which he cites is *Lethbridge* v. *Attorney General* (1907) A. C. 19, in which Lord Chancellor Loreburn said (p. 23):

> The general purpose of this sub-section is to prevent a man escaping estate duty by substracting from his means, during life, moneys or money's worth, which, when he dies, are to reappear in the form of a beneficial interest accruing or arising on his death.

With respect to the policies which are included within the measure of the Act, Hanson says (p. 4):

> Policies of assurance on the life of the deceased, which he has given away in his lifetime, but the premiums on which he has continued to pay. For instance, the deceased has insured his life and given the policy to his wife, but has himself paid the premiums; estate duty is payable on the policy moneys. The same result would follow if the policy were taken out in the name of the wife. But if he only pays part of the premiums, only a proportionate amount of the policy moneys will be chargeable with duty.

It appears, therefore, that in England, ever since 1853, the proceeds of life insurance policies have been regarded as property to be included in the measure of the tax under the statutes which this Court regarded as historic precedents for classifying legacy and estate taxes not as direct taxes but as duties or excises grouped under the generic term "death duties."

In *Attorney General* v. *Pearson* [1924], 2 K. B. 375, the court had under consideration a tax case under the Finance Act of 1894. The decedent had settled certain policies of insurance on his life in

trust for himself until marriage and thereafter in moneys payable under the policies in trust to pay the income to his wife for life, and after the decease of his wife in trust for the children, and if there should be no children of the marriage he should acquire an interest in the fund in trust for the settlor absolutely. The case seems to have turned upon the question whether the deceased had an interest within the meaning of the Act in the moneys which were to become payable under the policies. Mr. Justice Rowlatt, in deciding the case, said, page 388:

> I can not see that the deceased never had an interest in this property. On the contrary I think he had an interest in it. He had an interest in the policies before he settled them. Moreover after he settled them he had an interest in the benefit which was going to accrue or arise from them on his death, though it may have been a remote interest which he never could enjoy in possession. He had an interest during all his married life contingently upon the failure of the trusts in favor of his wife and children. If his wife and his children had predeceased him the legal position would have altered, but his interest would then have become a very proximate and extremely valuable interest, and he would have died worth the capital value of the insurance money.
>
> That being so, my judgment must be for the Crown with costs.

III

AS THE PROCEEDS OF THE POLICIES BEAR A JUST AND REASONABLE RELATION TO THE SUBJECT MATTER OF THE TAX, IT WAS WITHIN THE POWER OF CONGRESS TO INCLUDE THEM IN ITS MEASURE

In *Flint* v. *Stone Tracy Company*, 220 U. S. 107, sustaining the corporation excise tax of 1909, measured by income, after an exhaustive review of the subject this Court held that the only constitutional restriction upon the authority of Congress to fix the measure of an excise tax is that the measure must not be arbitrary but must be based upon a reasonable ground and bear a just and proper relation to the subject matter of the tax. About the constitutionality of an estate tax like the one here there can be no question, since *New York Trust Company* v. *Eisner*, 256 U. S. 345. The sole question is whether it is arbitrary and unreasonable to include in the measure of the tax the policy proceeds.

We have seen that these policies and all rights under them belonged to the deceased during his life to do as he pleased and in bankruptcy would have been available to his creditors; that if he died insolvent, to a considerable extent the proceeds would have been liable for his debts under the laws of the State where they were issued and where he died; that in many States the extent and nature of the exemption to which they would have been entitled has been deemed a proper subject for legislative regulation; that by common understanding

and in popular speech they are regarded as part of a man's estate, and that for many years they have been treated as part of the estate under statutes imposing taxes of this same generic group. This Court said in *Nicol* v. *Ames*, 173 U. S. 509, at page 515:

> In deciding upon the validity of a tax with reference to these requirements, no microscopic examination as to the purely economic or theoretical nature of the tax should be indulged in for the purpose of placing it in a category which would invalidate the tax. As a mere abstract, scientific or economical problem, a particular tax might possibly be regarded as a direct tax, when as a practical matter pertaining to the actual operation of the tax it might quite plainly appear to be indirect. Under such circumstances, and while varying and disputable theories might be indulged as to the real nature of the tax, a court would not be justified, for the purpose of invalidating the tax, in placing it in a class different from that to which its practical results would consign it. Taxation is eminently practical, and is in fact brought to every man's door, and for the purpose of deciding upon its validity a tax should be regarded in its actual, practical results, rather than with reference to those theoretical or abstract ideas whose correctness is the subject of dispute and contradiction among those who are experts in the science of political economy.

The same principle should apply here. Resort should not be had to abstruse and subtle distinctions

and microscopic examination of a theoretical nature in order to curb and cripple the great taxing power of Congress. This statute tries to bring within its scope every conceivable phase of modern ingenuity in creating and passing estates. Proceeds of insurance policies pass after the death of the decedent in a manner not substantially different from property which passes by will, inheritance, or intestacy, and Congress has deemed it proper to subject it to the same burden of taxation. This is not the use of the taxing power for an ulterior purpose, as in the *Child Labor Tax Case*, 259 U. S. 20, and the like. It is merely carrying out logically the collection of sources of revenue made available under *Knowlton* v. *Moore*, 178 U. S. 41, and *New York Trust Company* v. *Eisner*, 256 U. S. 345.

In *Matter of Schmidlapp*, 236 N. Y. 278, a case under the State transfer tax law, the court had under consideration a deed of trust which provided that the income should be paid to the grantor during his lifetime up to a certain date, after which or prior to his death, the income was to be paid to his sons during their lives with the right to them to dispose of the principal by appointment, but reserving to the grantor the right to direct and control investments during the continuance of the trusts and to modify, alter, or revoke in whole or in part the indentures. The question was, when the gift to the sons took effect for purposes of taxation? In an opinion by Chief Judge Cardozo the court held that the distinction between a gift which clothes

the donee with a right of present enjoyment, though subject to revocation at the will of the donor, and one where the donor reserves to himself not only the power to revoke but also enjoyment during life, so that no beneficial right enforceable against him exists until his death, is that in the one class of cases the law in force at the delivery of the deed and in the other the law in force at death is the measure of the right to tax. In the course of his opinion the Chief Judge said, page 284:

> The statute is assailed as a denial of "due process." The assault, we think, must fail. A gift by deed of trust to take effect in enjoyment upon the death of the donor, with the reservation of intermediate use, and with complete power of revocation, approaches so nearly to a gift by will that the legislature may declare their substantial identity for the purpose of taxation. (*Matter of Dows*, 167 N. Y. 227; *Orr* v. *Gilman*, 183 U. S. 278; *Matter of Delano*, 176 N. Y. 486; *Chandler* v. *Kelsey*, 205 U. S. 466.) The execution of such a deed is ineffective to clothe the donee with any right enforcible against the resistance either of the donor himself or of his personal representatives until the deed has been followed by death and the election to leave it unrevoked. Until then, any right that is acquired is imperfect and inchoate. The operative events that fill out the measure or content of a right are in a very real sense the events that fix the moment of its creation.

So in the present case. The naming of a beneficiary, with "complete power of revocation" reserved, was "ineffective" to clothe the beneficiary with any enforceable right until the death of the insured with the election to leave the designation unrevoked. Death was the operative event that filled out the measure of the right and fixed the moment of its creation. It approached so near a transfer by will or intestacy that Congress could rightfully declare their substantial identity for purposes of taxation.

If in order to support the tax it is necessary to rely upon a technical transfer from the assured to the beneficiary, it is plain that there was a transfer within the meaning of the statute. While it may be true that the beneficiaries got their money not from the executors but from the insurance company, it is also true that the interest which the assured had in the policies up to the moment of his death then ceased. If he had lived until the reserve equaled the face of the policies, they would then have matured and been paid to him. Upon his death the beneficiaries succeeded to that right, for his death matured the policy.

Nothing is paid over by the insurance company, whether to executors or directly to a named beneficiary, except the "fund" which he has created by "annual appropriation, or investment, of his moneys," *Kittel* v. *Domeyer*, 175 N. Y. 205, 212, *supra*, the fund which, if paid to the executors, would concededly be subject to the tax. It was his

money which brought the fund into being; his money which continued its life; and his death which caused that money to reappear in the form of a beneficial interest for them instead of for him. The fact that in the present case the amounts payable to the beneficiaries were much larger than the cash surrender value of the policies does not alter the principle. If instead of having been in force two years they had been in force many years, the difference might not have been great.

It seems to be conceded that proceeds of policies payable to the decedent or his estate are subject to the tax, but the difference between a bequest of the proceeds of a policy payable to the estate of the decedent, and the naming of a beneficiary in a policy of this kind is theoretical and unsubstantial. Why is it not reasonable to apply the same rule of taxation to both? As the proceeds of the policies bear a just and reasonable relation to the subject matter of the tax, it was within the power of Congress to include them in its measure. *Flint* v. *Stone Tracy Company*, 220 U. S. 107; *Greiner* v. *Lewellyn*, 258 U. S. 384.

IV

THE QUESTIONS RELATING TO THE MODE PROVIDED FOR THE COLLECTION OF A PORTION OF THE TAX BY THE EXECUTORS FROM THE BENEFICIARIES ARE NOT NOW BEFORE THE COURT

The questions relating to the mode provided for the collection by the executors from the beneficiaries of a portion of the tax paid need not be consid-

ered now, for they are not properly before the Court. The statute requires the executors to pay the tax, and they have paid it. Sections 408 and 409 of the statute give them a right of action against the beneficiaries to recover such portion of the total tax paid as the proceeds of the policies in excess of $40,000 bear to the net estate. The plaintiffs claim that this formula results in what they conceive to be inequality.

If we are right in our conclusion that the proceeds of the policies may properly be included in the gross estate in measuring the tax to be assessed upon the transfer of the net estate, then the executors could not complain if they were required to pay it all without any right of reimbursement. Of course, the testator could have directed the executors to pay the tax out of the residuary estate without attempting to recover any part. Should the executors sue a beneficiary to recover any portion of the tax the respective rights of the parties would then be determined.

As the executors paid the contested charge out of property which actually passed by death, only their rights are here involved. *Nichols* v. *Coolidge*, 274 U. S. 531, 541. It may be, as suggested in *Lewellyn* v. *Frick*, 268 U. S. 238, 251, that a serious question must be answered before the beneficiaries can be made to pay a portion of the tax, but we are not concerned with that question here. The only question is whether it was competent for Congress to in-

clude in the measure of the decedent's estate the proceeds of these policies.

If the decedent had made the policies payable to his estate, so that the proceeds would have passed by intestacy or by will, it is obvious that the amount of the estate tax would have diminished the amount receivable by the legatees or by the wife and next of kin. That being so it is hard to see what injustice there is in requiring the beneficiaries to return that which would have been deducted before it came to them, if the property had gone through the hands of the executor. If the beneficiaries are put in the position of intestate successors, then as to them the tax is not imposed upon them but precedes them, and the fact that they may receive less or different sums because of the statute does not concern the United States. *New York Trust Company* v. *Eisner*, 256 U. S. 345, 349.

CONCLUSION

Both questions certified should be answered in the negative.

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